

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

APPLETON PAPERS INC. and NCR CORP.,

Plaintiffs,

Case No. 08-CV-00016-WCG

v.

GEORGE A. WHITING PAPER COMPANY, et al.

Defendants.

**NEENAH-MENASHA SEWERAGE COMMISSION'S
PROPOSED FINDINGS OF FACT**

1. In 1994, NMSC entered into a cooperative agreement with the State of Wisconsin Department of Natural Resources (WDNR) and other defendants in this case (collectively known as the Fox River Coalition) to finance remediation of the Lower Fox River. *Affidavit of Roger Voigt (Voigt Aff.)*, ¶ 3, Ex. A.

2. The cooperative agreement stated that the members “agree to provide funding . . . for the purpose of financing a contract(s) for the remedial investigation (RI) of the contaminated sediment sites in the Lower Fox River identified in the 1993 Green Bay Remedial Action Plan Update as sites POG, D/E, N and EE(27) and a feasibility study (FS) of sites POG and N. Funding will be used solely for contractual purposes.” *Voigt Aff.*, ¶ 3, Ex. A.

3. In May 1994, NMSC paid \$19,457.00 to WDNR for sediment investigation, as agreed upon in the cooperative agreement. *Voigt Aff.*, ¶ 4, Ex. B.

4. In June 1995, NMSC paid \$1,915.79 to the Lower Fox River Dischargers Association, which included payment for WDNR water quality funding and a USGS flow gauging station. *Voigt Aff.*, ¶ 5, Ex. C.

5. In July 1995, NMSC paid \$11,974.00 to WDNR for sediment investigation of the Fox River. The funds were “used as matching funds for two projects related to cleanup of contaminated sediment in the Lower Fox River.” *Voigt Aff.*, ¶ 6, *Ex. D*.

6. In the letter accompanying NMSC’s July 1995 check, NMSC stated it “strongly supports the efforts of the Fox River Coalition and the Department to investigate contaminated sites downstream of DePere and to prepare to implement cost-effective remediation projects upstream of the DePere Dam.” *Voigt Aff.*, ¶ 6, *Ex. D*.

7. In February 1996, NMSC paid \$2,000.00 to Fox River Coalition – Natural Resources Foundation for the Fox River Coalition public education fund. *Voigt Aff.*, ¶ 7, *Ex. E*.

8. A letter from WDNR regarding the February 1996 payment thanked NMSC for its “participation through funding and in-kind services toward developing a strong public education component of Lower Fox River restoration activities.” *Voigt Aff.*, ¶ 7, *Ex. E*.

9. In February 1997, NMSC paid \$1,694.74 to the Lower Fox River Dischargers Association for its annual membership in the Association and for WDNR Fox River water quality monitoring stations. *Voigt Aff.*, ¶ 8, *Ex. F*.

10. NMSC’s facility did nothing in its process or treatment of influent that introduced PCBs into the wastewater it discharged. *Declaration of Elizabeth Miles in Support of Neenah-Menasha Sewerage Commission’s Motion for Summary Judgment on its Counterclaim (Miles Decl.)*, ¶ 2, *Ex. A*, *Nos. 8, 14*.

11. In 1935, the Wisconsin legislature passed Wis. Stat. § 66.20(11)(g) that required NMSC’s facility to accept waste except to “prohibit discharge into such sewers, of any liquid waste deemed detrimental to the sewerage system herein provided for.” *Miles Decl.*, ¶ 3, *Ex. B*.

12. In 1971, the Wisconsin legislature amended section 66 to include waste that “will or may be harmful to the system or any person operating it.” *Miles Decl.*, ¶ 4, Ex. C.

13. To this day, NMSC has not experienced harm to its operators or its systems from PCBs. *Miles Decl.*, ¶ 5, Ex. D at 28.

14. During the relevant time period, NMSC’s facility treated influent from several mills that recycled NCR Paper. *Miles Decl.*, ¶¶ 6-7, Exs. E at 395 and F at 751.

15. Wisconsin Tissue Mills, Inc. used fiber recovery systems including sidehill screens and save-alls at its facility before sending its wastewater to NMSC’s facility. *Miles Decl.*, ¶¶ 8-9, Exs. G and H.

16. Plaintiffs’ expert characterized Wisconsin Tissue Mills’ wastewater treatment practices as reasonable and prudent in preventing environmental harm. *Miles Decl.*, ¶ 10, Ex. I at 95.

17. NMSC first became aware that its effluent might be contributing to PCB contamination of a water body in November 21, 1975 from a *Milwaukee Sentinel* article reporting on a speech given by WDNR employee Stanton Kleinert regarding PCBs in Lake Michigan. *Miles Decl.*, ¶ 11, Ex. J.

18. The *Milwaukee Sentinel* article quoted Kleinert as saying, “a large part of the PCBs getting into Lake Michigan comes from the discharges of municipal sewerage treatment plants at Sheboygan, Neenah-Menasha, and Milwaukee.” *Miles Decl.*, ¶ 12, Ex. K.

19. NMSC knew of only two tests performed by WDNR at the NMSC facility involving PCBs: one on March 28, 1972, which indicated an effluent level of 3.3 parts per billion discharged from the facility, and one on October 16, 1974, which indicated a total of 0.16 parts per billion discharged. *Miles Decl.*, ¶ 11, Ex. J.

20. WDNR Acting Assistant Secretary sent NMSC a copy of Kleinert's report and stated, "In reading this report, I think you will agree that the Neenah-Menasha treatment plant is not cited as a major contributor of PCBs to Lake Michigan." WDNR did not suggest directly or indirectly that the NMSC treatment facility had any role in generating PCBs or should take any action. *Miles Decl.*, ¶ 13, Ex. L.

21. NMSC had primary treatment since 1937 and secondary treatment by 1967, which removed a significant amount of PCBs from NMSC's effluent. *Miles Decl.*, ¶¶ 6, 14, Exs. E and M at 270.

22. By the late 1960s, NMSC had expanded its plant even before learning that PCBs might be in its plant's effluent. *Miles Decl.*, ¶ 15, Ex. N at 653.

23. NMSC "employed reasonable and appropriate wastewater treatment methods from the 1950s to the 1980s." NMSC "worked cooperatively with the appropriate regulatory agencies" and "acted responsibly in its equipment upgrades, wastewater treatment, and solids management." *Miles Decl.*, ¶ 5, Ex. D at 28.

24. The plaintiffs characterized the Defendants as "innocent victims." *Miles Decl.*, ¶ 16, Ex. O.

Dated: April 2, 2010.

s/Elizabeth K. Miles

William J. Mulligan (WI Bar No. 1008465)

Kevin J. Lyons (WI Bar No. 1013826)

Elizabeth K. Miles (WI Bar No. 1064284)

Davis & Kuelthau, s.c.

111 E. Kilbourn Avenue, Suite 1400

Milwaukee, WI 53202

Telephone: (414) 276-0200

Facsimile: (414) 276-9369

Email: wmulligan@dkattorneys.com

klyons@dkattorneys.com

emiles@dkattorneys.com